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No. 82-

IN THE

Supreme Court of the United States

October Term, 1982

JOSEPH J. IMHOFF and ESTATE OF EDITH M. IMHOFF, Deceased, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK, N.A., Co-Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SAMUEL T. SWANSEN
JONATHAN L. BRAFF
DECHERT PRICE & RHOADS
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

Attorneys for Petitioners

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-6711

QUESTION PRESENTED

Do not the federal courts have a duty, upon discovering that an attorney for the Internal Revenue Service avoided entry of judgment against the government and in favor of taxpayers by means of a fraud perpetrated on the court, to open the judgment later entered against taxpayers?

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OPINIONS BELOW

The Court of Appeals for the Third Circuit issued a judgment order, but no opinion, in this case. The Order is reprinted in the Appendix at p. A1. The Tax Court filed its Memorandum Findings of Fact and Opinion on January 31, 1980, which is reported at 39 T. C. M. (CCH) 978 (A6).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 30, 1981. A timely petition for rehearing was denied on August 24, 1982, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1) and 28 U. S. C. § 2101(c).

STATEMENT OF THE CASE

Petitioners commenced this action in the United States Tax Court by Petition filed on January 13, 1977, in response to an Internal Revenue Service Notice of Deficiency in income taxes served on Colonel Joseph J. Imhoff and Edith M. Imhoff, his wife, for the taxable year ended December 31, 1973. Edith M. Imhoff, co-petitioner at the inception of this action, died on April 1, 1980, prior to the rendering of the decision and the entry of a final order by the Tax Court, and the caption was changed to make the Estate of Edith M. Imhoff and its co-executors, Joseph J. Imhoff and American Security Bank, N.A., additional petitioners.

The matter was originally scheduled for trial on February 21, 1978 before the Honorable William H. Quealy. When it appeared that the parties were unable to reach an agreement as to a stipulation of pertinent facts in preparation for trial, as required by Rule 91(a) of the Rules of Practice and Procedure of the United States Tax Court, the Commissioner filed a Motion for an order to show cause why the stipulation of facts proposed by the Commissioner should not be adopted. On February 1, 1978 Judge Quealy heard argument on this Motion. After hearing Colonel Imhoff's objections to the Motion, Judge Quealy, declaring that he was "not going to sit down there and work out of a shoebox" (A46), warned the parties that:

> "without a stipulation of fact and without the parties working toward accomplishing that, the Court intends to dismiss this proceeding one way or the other, either in favor of party A or party B, whichever the party is at fault."

(A44).

Specifically, Judge Quealy ordered the Imhoffs to produce for the Commissioner whatever evidence, segregated by expense category, they intended to offer at trial in support of the disputed deductions no later than February 10, 1978. (A43, A45). The court further expressly stated that if the material was delivered to the Government's attorney, Mr. Stewart, by the date ordered, the Imhoffs would have discharged their responsibility. (A43). Once delivery was completed, the court continued, the Commissioner's counsel was to look the material over and put it into proper form for stipulation. (A45). Judge Quealy gave Mr. Stewart until February 17, 1978 to complete this task, and ordered him to report to the court on that day as to whether the stipulation was ready. (A47). Colonel Imhoff's request to also appear at that time was denied. (A39). However, Judge Quealy assured Colonel Imhoff that "if Mr. Stewart is dilatory I'll default him just as quickly as I'll default you." (A45).

The Imhoffs complied fully with Judge Quealy's directive and discharged their obligation in connection with preparation of the stipulation. (A39). Counsel for the Commissioner, on the other hand, did not fulfill his obligation, having failed to complete the written stipulation as required. To prevent the entry of a default judgment in favor of petitioners, Mr. Stewart appeared at the call of the list on February 15th, in petitioners' absence, and lied to Judge Quealy, stating that Colonel Imhoff had requested a continuance due to illness of Mrs. Imhoff. (A51). In fact, Mrs. Imhoff was not then ill, and Colonel Imhoff had never asked Mr. Stewart to request a continuance. (A40). Based upon counsel's knowing misrepresentation, Judge Quealy granted the continuance without further inquiry. (A5).

Colonel Imhoff did not learn of the Government counsel's willful deception until more than eleven months later, on January 30, 1979, and was unable to obtain a

copy of the transcript of the February 15, 1978 proceedings until February 26, 1979. Petitioners presented motions, pre-trial and post-trial, to Judge Irene Scott of the Tax Court, to whom the case had been reassigned for trial, asking that judgment be entered against the Commissioner for the failure of counsel to comply with Judge Quealy's order of February 1, 1978. (A52-A53, A54-A55). Judge Scott denied these Motions, stating that it had been up to Judge Quealy to dismiss the case and that since he had not done so, she found no ground for dismissal. (A53, A55). Judge Scott reached this decision despite petitioners' assertions that Judge Quealy's decision not to dismiss the case was based upon the fraudulent statement of the Commissioner's counsel, and despite the ending of Judge Quealy's involvement with the case after granting the continuance and before petitioners were able to learn of the fraud.

The matter was tried before Judge Scott on January 31 and February 1, 1979 and, on January 31, 1980, Judge Scott filed her Memorandum Findings of Fact and Opinion. (A6).

Petitioners thereafter filed with the Tax Court a Petition for reconsideration of the court's ruling on petitioners' earlier Motions, with accompanying affidavit of Colonel Imhoff setting out the facts concerning the government attorney's egregious conduct. (A36). Judge Scott dismissed the Petition without a hearing within one day, and on September 9, 1981 entered a decision finding a deficiency in the amount of $6,675. (A31).

The court of appeals affirmed without opinion, and denied petitioners' Petition for Rehearing (A1, A34), in both cases over argument that the government attorney's perpetration of a fraud upon the court in order to avoid the sanction of Judge Quealy constituted grounds for dismissal of the deficiency assessment entered by the Tax Court or, in the alternative, for remand for an evidentiary hearing on the matter.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With the Decisions of This Court and of Numerous Other Circuits and Raises an Important Question of Federal Law

This Court, in *Hazel-Atlas v. Hartford Co.*, 322 U. S. 238 (1944), vacated the judgment of the Third Circuit there appealed from based upon appellant's showing of a fraud perpetrated upon the trial court under the direction of appellee's attorney. In the course of its opinion, the Court stated that:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

Id. at 246. Petitioners here seek review of the Tax Court and Court of Appeals for the Third Circuit's complacent tolerance of the fraud committed by the Government's attorney in this case.

The fraud here in question took the following form. Judge Quealy of the Tax Court ordered the Government's attorney, in no uncertain terms, to prepare for stipulation the documentary evidence produced and categorized by petitioners by February 17, 1978 or else suffer dismissal. As noted by the court in *United States v. An Undetermined Quantity*, 583 F. 2d 942 (7th Cir. 1978), the duty of compliance with the orders of courts "is particularly important when Government officers are involved, for '[t]he greater the power that defies the law the less tolerant can this Court be of defiance.'" *Id.* at 949, quot-

ing *United States v. United Mine Workers*, 330 U. S. 258, 312 (1947).

Attorney Stewart not only failed to comply with the Tax Court's Order, he perpetrated a fraud upon the court in order to conceal that fact. Without any foundation in fact or authority to do so, Stewart represented that it was petitioners, not he, that were out of compliance and who therefore requested a continuance. Such conduct by a government official, perhaps especially where the Internal Revenue Service is concerned, must not be condoned. *See, e.g., Birnholz v. United States*, 199 Ct. Cl. 532 (1972) ("Members of the public, who must turn square corners in tax matters, demand no less of revenue officials." *Id.* at 537).

The fraudulent conduct described above contains those two factors which formed the basis for this Court's decision in *Hazel-Atlas*. There, the fraud complained of was not merely a matter between two private parties in that it invoked the public's interest in the operation of the U. S. Patent Office. This fact heightened the Court's concern with the integrity of the judicial proceeding under review. *Hazel-Atlas v. Hartford Co.*, 322 U. S. at 246. The instant case is likewise not just a private dispute, as the public clearly has a strong interest in the dishonesty of an official of the Internal Revenue Service testifying in a court of law.

As to the second factor, Professor Moore, analyzing the *Hazel-Atlas* decision, notes that the fraud in that case did not clearly influence the outcome so that the case is not easily distinguished from cases where the Court has denied relief. 7 J. MOORE FEDERAL PRACTICE ¶ 60.33 (2d ed. 1982). Moore concludes, however, that the distinction lies in the fact that in *Hazel-Atlas*, as in this case, an attorney was implicated in perpetrating the fraud. This is important, Moore believes, for:

> an attorney is an officer of the court . . . . [H]is loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.

Id. at 513.

Based on his reading of *Hazel-Atlas*, Moore offers a definition of "fraud upon the court" which encompasses fraud perpetrated by officers of the court. Moore's definition has been expressly adopted in a number of jurisdictions. *See, e.g., Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F. 2d 833, 837 (5th Cir. 1980); *H. K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F. 2d 1115, 1119 (6th Cir. 1976); *Wilkin v. Sunbeam Corp.*, 466 F. 2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U. S. 1126 (1973); *Kupferman v. Consolidated Research and Manufacturing Corp.*, 459 F. 2d 1072, 1078 (2d Cir. 1972); *Kenner v. Commissioner of Internal Revenue*, 387 F. 2d 689, 691 (7th Cir.), *cert. denied*, 393 U. S. 841 (1968); *Great Coastal Express v. International Brotherhood of Teamsters*, 86 F. R. D. 131, 138 (E. D. Va. 1980) (District Court, finding no Fourth Circuit opinion on the question, adopts Moore's definition, satisfied that the Circuit Court would find Moore's discussion persuasive).

The Third Circuit, by failing to accord petitioners the relief requested, has effectively rejected the position taken by those circuits listed above that dishonesty of an attorney, by definition, constitutes a fraud upon the court.[1] The clear conflict presented here, providing this

1. Petitioners, in their Brief below, stated to the Third Circuit that it had specifically adopted Professor Moore's formulation in *Stickler v. Commissioner of Internal Revenue*, 464 F. 2d 368 (3d

Court with the opportunity to clarify the scope of its holding in *Hazel-Atlas*,[2] warrants the grant of certiorari to review the judgment below.

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1. (Cont'd.)

Cir. 1972) (court concludes appellants failed to demonstrate fraud upon the court). The Third Circuit's decision in this case, however, suggests that the court has reversed or narrowed its position on the issue. The Third Circuit's ruling in *Hazel-Atlas*, reversed by this Court, and in the instant case indicate that this circuit continues to adhere to a standard different from that of this Court and of the other circuits for finding fraud upon the court.

2. The recent decision of the Utah District Court in *Bulloch v. United States*, No. C-81-0123C (D. Utah Aug. 4, 1982) underscores the need for such clarification. Although ultimately granting plaintiff sheep ranchers relief from a 26 year old judgment on the basis of findings that the judgment was obtained by fraud on the part of government agents, the court states that "[f]raud upon the court is a nebulous concept," and notes Professor Moore's contention that *Hazel-Atlas* expanded the traditional fraud on the court concept. *Bulloch v. United States* at 54-55.

CONCLUSION

Accordingly, the petitioners, Joseph J. Imhoff and Estate of Edith M. Imhoff, Joseph J. Imhoff and American Security Bank, N. A., co-executors, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding July 30, 1981.

Respectfully submitted,

SAMUEL T. SWANSEN
JONATHAN L. BRAFF
DECHERT PRICE & RHOADS
3400 Centre Square West
Philadelphia, PA 19102
Attorneys for Petitioners